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In the

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1530

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF SPOKANE, a foreign corporation,
Respondent.

RESPONDENT'S BRIEF

GEORGE C. DALTHORP
CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH
500 Electric Building
P.O. Box 2529
Billings, Montana 59103
Tel. (406) 252-3441
Attorneys for Respondent

KELLY & FOLEY
1101 North 27th Street
Billings, Montana 59101
Attorneys for Petitioners

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RESPONDENT'S BRIEF

QUESTIONS PRESENTED

None of the reasons set forth in Supreme Court Rule 19 (1) (b) calling for an exercise of this Court's power of supervision exist in this case. The decision by the Court of Appeals for the Ninth Circuit is not in conflict with any decision of any other court of appeals and is wholly consistent with the laws of the State of Montana.

Furthermore, we do not agree that the petition accurately presents the controlling issues. The fundamental threshold issue as far as petitioners' case is concerned is as follows:

1. Can a mortgagee be required to release upon demand and without consideration a portion of the property secured by its mortgage in the absence of a contractual provision so requiring; particularly, where the mortgagee is an instrumentality of the federal government whose partial release policies are supportive of the statutory purposes for which is was established?

STATEMENT OF THE CASE

In 1966, the petitioners (hereinafter referred to as "the Millers") borrowed $47,800 from the respondent Federal Land Bank of Spokane (the "FLB") secured by a mortgage on a farm owned by the Millers. In 1972 Burlington Northern Inc. (the "BN") filed a condemnation action for the purpose of acquiring a right of way for a railroad spur track across and through the Millers' farm. After the Millers were served with the summons and complaint in the condemnation action, they entered into an agreement with the railroad to sell to it the desired lands for a total consideration of $31,400, including any severance damages.

The BN issued its check in the sum of $31,400 payable to the Millers and to the FLB. When the FLB refused to endorse the check and grant a partial release of the mortgage without the Millers complying with the FLB's partial release policy, the Millers brought this action.

The mortgage contained a clause providing that if any of the mortgaged property was taken under right of eminent domain, the mortgagee could at its option require that all

compensation received by the mortgagor be applied against the debt secured by the mortgage. (Appendix A-1, p. 4, Petitioners' Brief; 487 F.2d 415, 418.) The FLB's policy regarding application for releases of portions of property secured by mortgages provided, insofar as is pertinent here, that if the interest rate on the loan was less than the interest rate currently being charged on new loans, the granting of the partial release would be conditioned upon either the application of one-half of the sales price to the balance due on the mortgage debt, or, the reamortization of the loan secured by the mortgage at the current rate.

The district court, after ruling that the eminent domain clause in the mortgage was not applicable because an order actually condemning the lands had not been entered prior to the sale of the right of way to the railroad, held that the FLB was not entitled to have *any* of the settlement proceeds applied to the mortgage debt (371 F.Supp. 1105). The case was subsequently submitted to the jury on the issue of damages, with the jury being instructed by the court that the FLB was not entitled to have any of the proceeds of the sale of the lands to the BN applied against the mortgage debt, and, that the Millers were entitled to damages for the wrongful withholding of $31,400 from them from November 8, 1972 through April 22, 1974. (See Appendix I hereto for text of the instruction; record p. 525.)

ARGUMENT

Contrary to petitioners' assertions, the court of appeals did not misconstrue the district court's opinion nor confuse

the eminent domain clause of the mortgage with the partial release policies of the Federal Land Bank of Spokane. A fundamental error of the district court was in brushing aside consideration of the partial release policy of the FLB and in holding, in effect, that the FLB was obligated to grant a partial release of its mortgage without consideration and without its consent upon a sale of a portion of the mortgage lands by the mortgagor. The court of appeals recognized this error, stating:

> "'(A) mortgagee cannot be compelled to accept a part of his debt and release a corresponding part of the land, unless he has expressly agreed to do so. . .' 59 C.J.S. Mortgages § 479, p. 757. We know of no law that would prevent the Bank from demanding a portion of the proceeds of a sale of a part of the mortgaged property as consideration for its willingness to release its lien upon the portion sold, at least provided that what it does is not truly unconscionable. We are unable to agree with the district judge that the Bank's stated policies or its administration of them, as disclosed by the record, are unconscionable."
>
> 587 F.2d at p. 420.

It appears to be the universal rule that a mortgagee cannot be compelled to release a portion of the security covered by its mortgage, even upon tender of a part of the debt, unless he agrees. *59 C.J.S. 757,* Mortgages § 479, *Federal Land Bank v. Clinchfield Lumber & Supply Co.,* Va. 1938, 198 S.E. 437; *Stevahn v. Meidinger,* N.D. 1952, 57 N.W.2d 1, 12-13; *Cassinella v. Allen,* 168 Cal. 677, 144 Pac. 746. The lower court not only compelled the FLB to consent to the sale of a portion of the security, but required it to do so without having any of the proceeds of the sale applied to the debt.

We also dispute petitioners' assertion that the Federal Land Bank's partial release policies were not an issue in the district court on the declaratory judgment count. The Bank's reply brief in connection with the motions for summary judgment before the lower court contained the following:

> "(W)e wish to point out the bank's concern with the condemnation money arises by reason of the request of the borrowers for a partial release of the mortgage, and, if the Burlington Northern were to pay the borrowers without putting the bank's name of the checks and without requesting a partial release of the mortgage, the matter would probably not even come to the attention of the bank. The bank's policy as set forth in their Policy and Operations manual is exactly the same whether the matter comes up by its being made a party to a condemnation action or upon a request for partial release of the mortgage. The property taken by or conveyed to the Burlington Northern was property covered by the mortgage and the Federal Land Bank, by requiring 50 per cent of the proceeds or a reamortization of the loan at current interest rates in exchange for a partial release of the mortgage was following its specifically stated and consistently followed policies relating to the granting of partial releases of its mortgages." (Record, p. 102)

While the district court did not specifically refer to the policies by name they were by necessary implication struck down. The court of appeals appropriately corrected this error.

Petitioners' "questions presented for review" are misleading. Starting with No. 1, Petitioners suggest that the FLB, by amendments to its partial release policies, "jacks

up the interest rates contrary to the terms of the original mortgage agreement". Two basic assumptions in this position are erroneous. First, the impetus for the change in the status of the mortgage did not come from the FLB. It had no intention of disturbing the loan or the interest rates thereon if a partial release had not been requested. Secondly, contrary to Petitioners' assertions, the partial release policy of the FLB as far as it applied to the Millers' situation was essentially the same at the time the mortgage was executed in 1966 as it was when the Millers sold the strip of land in 1972. We quote the pertinent portions of the policy as it was on the date the mortgage was given on June 6, 1966, and as it then had been since January 25, 1961:

> "Under this general heading are detailed the procedures to be followed when a borrower . . . desires to have released from his mortgage . . .
>
> "(1) Any part of his farm or
>
> • • •
>
> "(5) Rights of way or easements, whether by condemnation or otherwise . . .
>
> "GENERAL POLICY
>
> "Loans. A partial release of the security for a loan . . . may be granted under any of the following conditions provided the credit factors are favorable:
>
> "1. Without any payment or other adjustment on the loan when
>
> "(a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan;
>
> • • •

> "2. With the application on the loan of the required consideration or appropriate adjustment as indicated:
>
> • • •
>
> "(b) If the interest rate on the loan is less than the bank's minimum refunding rate applicable to the loan, the granting of the partial release will be conditioned upon
>
> "(1) The payment of at least one-half of the present market value or sale price, including severance damages, of the security to the released (whichever is higher) for application on the balance of the loan even though the remaining security is ample to support the remaining loan; or
>
> "(2) The payment of an amount necessary to reduce the remaining loan to the maximum loanable and reamortizing the balance at the minimum refunding interest rate applicable to the loan.
>
> • • •
>
> "*Condemnations.* In general, the policy with respect to partial releases will also apply in the settlement of condemnation suits. • • •"

(The entire text of the partial release policy effective on 1-25-61 and 6-6-66 is set forth in Appendix II hereto.)

The phrase, "the bank's minimum refunding rate applicable to the loan" is related to the interest rate chargeable on current loans and was generally within a half a percentage point of it. Thus, the subsequent amendments to the partial release policy in which the phrases "current interest rate loans" and "less than current rate loans" became to be used were not changes in concept but rather were changes in terminology. Under paragraph 1(a) above, no payment would have to be made on the loan if "the interest rate on the loan (was) at least equal to the bank's minimum refund-

ing rate applicable to the loan", but under paragraph 2(b), if the "interest rate on the loan (was) less than the bank's minimum refunding rate applicable to the loan", the granting of the partial release was conditioned upon either the payment of one-half of the sale price including severance damage (¶2(b) (1)), or, reamortization of the loan at the "minimum refunding interest rate applicable to the loan". ¶2(b) (2).

It is therefore apparent that the Petitioners' rhetoric regarding the FLB's change in the partial release policy affecting the Millers is without any basis and the issue of whether the partial release policies became part of the mortgage contract (which we deny) isn't even in the case.

Regarding petitioners' "Question Presented for Review 2," obviously, the court of appeals in a diversity case is generally required to follow the substantive law of the state wherein the case arose, and in this case the Court of Appeals for the Ninth Circuit did just that. With respect to Question 3, we are unable to understand in what way M.C.A.§ 71-1-222 (formerly R.C.M. 1947, § 93-6001) is relevant to the issues in this case. Petitioners' question Number 4 refers to the mortgagee demanding "immediate compensation and profit from the sale of a right of way easement". No "compensation" or "profit" is involved in these proceedings, only that one-half of the proceeds be applied against the mortgage debt. Regarding Question Number 5, obviously the Federal Land Bank can't nullify and void Montana laws by unilateral amendments of its own policy rules; nor has it attempted to do so.

Petitioners' remaining questions relate to fraud and punitive damages. The district court's ruling on the declaratory judgment count distorted the issues in the case, but even if the ruling had been correct, the issues of fraud and punitive damages should never have gone to the jury.

As is correctly stated in the opinion of the court of appeals, the Federal Land Bank of Spokane exists to provide long-term loans to farmers at the lowest possible interest rates. Its partial release policies are designed to help it to fulfill its purpose. Its ability to do so would be impaired were the policies to be struck down. What gain petitioners seek in this case would be at the expense of the other borrowers and prospective borrowers from the FLB. To strike down the long standing and reasonable partial release policies of the FLB would be detrimental to the basic purposes of the FLB and to the system of farm credit which has served American agriculture so well with no continuing expense to the taxpayers.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be denied for the reason that the decision of the Ninth Circuit is wholly consistent with Montana law in all rulings favorable to the respondent, and the decision is not in conflict with the decision of any other court of appeals. The petition simply does not present the factual and legal conditions precedent required to move the Court's

discretion in granting the writ of certiorari.

Respectfully submitted.

CROWLEY, HAUGHEY,
HANSON, TOOLE &
DIETRICH

By GEORGE C. DALTHORP
George C. Dalthorp
500 Electric Building
P.O. Box 2529
Billings, Montana 59103
Attorneys for Respondent

CERTIFICATE OF MAILING

The undersigned, GEORGE C. DALTHORP, a member of the Bar of the Supreme Court of the United States does hereby certify that he mailed three copies of the Respondents' Brief to the Petitioners by mailing copies postage prepaid on April 25, 1979, to their counsel, William T. Kelly, 1101 North 27th Street, Billings, Montana, 59101.

GEORGE C. DALTHORP
George C. Dalthorp

APPENDIX I
APPENDIX II

APPENDIX I

Court's Instruction No. 7 given to the jury:

"You are instructed that the Court has ruled in a prior proceeding that the defendant was not entitled to require that any of the proceeds of the sale of land to the Burlington Northern be applied against the mortgage debt. You are further instructed that the plaintiffs are entitled to damages for the withholding of the sum of $31,400.00 from them during the period from November 8, 1972, through April 22, 1974. The measure of such damages is 6% interest thereon during said period, or, in the alternative, such actual damages that you may find from the evidence herein that plaintiffs sustained proximately caused by the withholding of the said funds."

(Record, p. 525)

APPENDIX II

PARTIAL RELEASES

SEC.

Under this general heading are detailed the procedures to be followed when a borrower or purchaser desires to have released from his mortgage or contract, 251

(1) Any part of his farm or gravel or timber thereon;

(2) Buildings or any other permanent improvements;

(3) Oil, gas, or other minerals, or rights to future income from minerals;

(4) Water rights; or

(5) Rights of way or easement, whether by condemnation or otherwise, for a highway, pole line, canal, pipe line, or for other purposes.

GENERAL POLICY

Loans. A partial release of the security for a loan, including the release of minerals and the right to future income from minerals as well as subordinations to mineral leases, may be granted under any of the following conditions provided the credit factors are favorable: 252

1. Without any payment or other adjustment on the loan when

   (a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is at least equal

to the bank's minimum refunding rate applicable to the loan; or

(b) The market value or sale price of the security is nominal; or

(c) An inconsequential portion of the security is to be released to a member of the borrower's immediate family, or for a public or charitable use.

2. With the application on the loan of the re- required consideration or appropriate adjustment as indicated:

(a) If the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan and the remaining security is not sufficient to support the loan, a payment will be required sufficient to reduce the balance to the amount the security will support on a new loan basis, if it is practicable to do so; but if this is not practicable, the remaining loan should be at least as well secured as the existing loan in relation to the normal market value of the security.

(b) If the interest rate on the loan is less than the bank's minimum refunding rate applicable to the loan, the granting of the partial release will be conditioned upon SEC. 252

(1) The payment of at least one-half of the present market value or sale price, including severance damages, of the security to be released (whichever is higher) for application on the balance of the loan even though the remaining security is ample to support the remaining loan; or

(2) The payment of an amount necessary to reduce the remaining loan to the maximum loanable and reamortizing the balance at the minimum refunding interest rate applicable to the loan.

Exceptions

1. If the appropriate conditions exist, the partial release may be granted without consideration under 1(b) or 1(c).

2. Unless required by the association, no payment will be required for consents to easement or consents to removal, except timber given consideration in the appraisal and subject to release only under the provisions of that portion of the manual titled "Loans on Forest Lands—Making and Servicing."

3. In condemnations, depending on the circumstances, more latitude may be allowed in determining the payment required. The reasons for any departure from the stated partial release policy should be reported to the bank.

(c) Application on the loan of the entire net sale price, if the portion to be released is being sold at full value, the partial release on such basis may be granted if it appears to be in the best interests of the bank and the association, even though the application of such amount will not result in reducing the loan to an amount that may be supported on a new loan basis.

Partial releases are granted on a cash basis only and release instruments may not be delivered until the consideration required for application on the loan

is received. Neither may commitment be made for releases to be granted at a future date or for piecemeal releases for subdivisions or similar purposes. Releases of timber and gravel may provide for payment as the timber or gravel is removed and sub-

ordination to mineral leases may likewise provide that the required consideration be paid from mineral income as it is received. With these exceptions, however, releases will be on a cash basis, and application of funds to effect "partial prepayment," i.e., to reduce installments over the remaining term of the loan, will be permitted only when the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan. If the terms of approval are not met within a reasonable time the commitment will be cancelled and the applicant notified of the cancellation. SEC. 252 *

Condemnations. In general, the policy with respect to partial releases will also appy in the settlement of condemnation suits. In determining the payment to be required the amounts paid for costs and attorney fees may be excluded and consideration may also be given to excluding amounts allowed for fencing or other improvements to be made on the 252.50 *

remaining security; provided reasonable assurance is had that the improvements will be made to the extent necessary to maintain the bank's security margin.

CERTIFICATE OF MAILING

The undersigned, GEORGE C. DALTHORP, a member of the Bar of the Supreme Court of the United States, does hereby certify that he mailed three copies of the Respondents' Brief to the Petitioners by mailing such copies, postage prepaid, on April 25, 1979, to their counsel, William T. Kelly, 1101 North 27th Street, Billings, Montana 59101.

GEORGE C. DALTHORP

George C. Dalthorp